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COURT OF CRIMINAL APPEALS
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No. PD-0381-17
In the Court of Criminal Appeals
At Austin

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No. 01-15-00187-CR
In the Court of Appeals for the
First District of Texas at Houston

———♦———

No. 1316546
In the 339th District Court of Harris County, Texas

———♦———

ADRIAN AARON MENDEZ
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S BRIEF ON DISCRETIONARY REVIEW

———♦———

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IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1(a) and 38.2(a)(1)A, a list of the names of all attorneys and parties is provided below:

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Trial Judge:

Honorable Maria T. Jackson—Presiding Judge of the 339th District Court

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

The appellant was indicted for murder. CR 19. A jury found the appellant guilty of the lesser-included offense of aggravated assault with a deadly weapon, and sentenced him to seven years confinement. CR 1156-1157. The trial court certified the appellant's right to appeal, and the appellant filed a timely notice of appeal. CR 1154-1155.

On February 23, 2017, the First Court of Appeals issued an opinion reversing the appellant's conviction. *Mendez v. State,* No. 01-15-00187-CR, 2017 WL 711736, at *4-9 (Tex. App.—Houston [1st Dist.] Feb. 23, 2017, no pet. h.) (op. withdrawn and superseded on denial of reh'g). The State filed a motion for rehearing. State's Mot. for Reh'g, Mar. 15, 2017. On April 4, 2017, the First Court of Appeals of Houston denied the State's motion for hearing, withdrew the opinion and judgment of February 23, 2017, affirmed the reversal of the appellant's conviction, and issued a new opinion and judgment. *Mendez v. State,* No. 01-15-00187-CR, 2017 WL 1230596, *4-10 (Tex. App.—Houston [1st Dist.] April 4, 2017, pet. granted). The State filed a petition for discretion review in this Court on April 25, 2017, which this Court granted on June 28, 2017.

ISSUE PRESENTED

Did the First Court of Appeals err by holding that there was charge error, even though the appellant never objected to or requested that the jury charge include a defensive issue of self-defense to the defensive issue of the lesser-included offense?

STATEMENT OF FACTS

Trial Proceedings

Jacob Castillo, the complainant, and the appellant were good friends. III RR 56-58. After a night of separately drinking alcohol and doing drugs, the two ended up at a diesel shop owned by a friend around 3:00 a.m. III RR 19-25, 26, 61-68, 70-71, 142-144, 148. Castillo and the appellant began arguing with each other. III RR 29-30, 72, 74-76, 151-152; IV RR 35-37. The fight became physical. III RR 77, 89; IV RR 37. The appellant produced a knife and began to stab Castillo, who began bleeding. III RR 30, 32, 77, 79-80, 82-83, 91-92, 150-151, 154; IV RR 36-38. No one saw Castillo with a weapon. III RR 31, 84-85.

Castillo was taken to Ben Taub Hospital where he had surgery. IV RR 65. After surgery, he was in a coma, and his conditioned worsened. IV RR 65. He died two months later of complications of multiple stab wounds to the head, neck, and torso. IV RR 66, 128.

Various relatives of the appellant and the appellant himself testified that Castillo had a reputation for violence, for using guns and knives, and for being involved in gang activity. V RR 33-67, 89-90. The appellant testified that Castillo reached for his back, and the appellant thought he was about to be killed so he pulled out his pocketknife and stabbed him. V RR 100-101, 109-111.

The jury was charged on the definitions of murder and a lesser-included offense of aggravated assault. CR 1119-1120. The jury was charged on the legal definition of self-defense. CR 1126-1127. The charge included a self-defense instruction only to the offense of murder. CR 1127-1128. The appellant stated he had no objection to the charge. VI RR 4. The appellant was found guilty of the lesser-included offense of aggravated assault. CR 1156-1157.

Procedural Facts

Pertinent to the issue on discretionary review, the appellant complained on appeal that "he suffered egregious harm when the trial court's charge failed to instruct the jury that self-defense applied to both the charged offense of murder as well as the lesser-included offense of aggravated assault for which the appellant was found guilty." App. Br. 7.

The First Court of Appeals reversed the appellant's conviction, holding that there was charge error because (1) since the charge did not apply self-defense to

the lesser-included offense, there was charge error, and (2) the charge error resulted in egregious harm. *Mendez*, 2017 WL 1230596, *4-10.

ARGUMENT FOR SOLE GROUND FOR REVIEW

The court of appeals erred by holding that there was charge error, even though the appellant never objected to or requested that the jury charge include a defensive issue of self-defense to the defensive issue of the lesser-included offense.

The First Court held that there was error, finding the application paragraph to self-defense only applied to the charge of murder. *Mendez*, 2017 WL 1230596, at *7. This is incorrect because defensive issues must be requested by the appellant, and no self-defense instruction was requested by the appellant on the lesser-included offense in this case.

Appellant Must Object to or Request Defensive Issues

A trial court need not include a defensive issue in a jury charge unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge. *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). This is because strategic decisions are generally left to the lawyer and the client. *Id.* at 63. Further, a contrary holding could both impose unwanted defensive issues in the charge and encourage parties to retry the case on appeal under a new defensive theory. *Id.* The *Posey* Court found that the plain language of Article 36.14 mandates that a defendant must object to claimed errors of commission and omission in the charge before he complains on appeal. *Id.* at 64; Tex. Code Crim.

Proc. art. 36.14. The Court distinguished *Almanza* because *Almanza* focuses on "omissions of issues upon which the trial court has a duty to instruct without a request from either party or issues that have been timely brought to the trial court's attention." *Posey*, 966 S.W.2d at 64 (citing *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1984) (op. on reh'g)).

Lesser-included-offense instructions and self-defense instructions are defensive issues that must be requested by the defense. *Tolbert v. State*, 306 S.W.3d 776, 781 (Tex. Crim. App. 2010) (holding that the trial court has no duty to *sua sponte* instruct the jury on lesser-included offenses absent a request by the defense); *Williams v. State*, 273 S.W.3d 200, 221 (Tex. Crim. App. 2008) (noting that the court should not *sua sponte* submit a self-defense instruction against the defendant's wishes); Tex. Penal Code ch. 8 (general defenses). Thus, based on *Posey*, the trial court should not be required to *sua sponte* include a self-defense instruction to a lesser-included-offense instruction. Instead, it is the responsibility of the defendant to request such an instruction or to object to the charge. *See Posey*, 966 S.W.2d at 62-64; Tex. Code Crim. Proc. arts. 36.14, 36.15. Here, appellant affirmatively stated he had no objection to the charge. VI RR 4.

Unintended Consequences

The rule proposed by the First Court will have unintended consequences. It allows the defense attorney to benefit from the presumption that defensive issues

are strategic issues for the defense at trial, while at the same time allowing a reversal on appeal where a defensive instruction is not included.

A rule that creates error when a defense attorney does not to object to a defensive issue circumvents the interplay between defensive issues and ineffective assistance of counsel analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). Because defensive issues are implicated, it is unfair to assume that (1) this is trial court error, or (2) this is error without giving the trial attorney the opportunity to respond to appellant's claims on appeal.

Judge Mansfield expounded on this idea in his concurrence in *Posey*, noting that:

> Appellant, in my opinion, has likely satisfied both prongs of *Strickland* and is therefore probably entitled to habeas relief. I join the opinion of the Court as I agree the trial court did not commit fundamental error by failing to instruct the jury as to the defense of mistake of fact. Rather, appellant was denied a fair trial due to ineffective assistance of counsel, and, as this issue is not before us, we are not at liberty to address it. He is, of course, free to raise it by filing an application for habeas corpus relief.

Posey, 966 S.W.2d at 66 (Mansfield, J., concurring). Similarly, a writ of habeas corpus would be the correct vehicle to attack trial counsel's failure to request a defensive issue instruction in this case. Forcing the trial court to decide how to apply defensive issues contradicts the goals of *Posey* and interferes with a defense attorney's duty to make strategic decisions.

Appellate Courts

Several appellate courts have followed *Posey*'s reasoning to conclude that there is no charge error unless the defense objects to a charge that does not include a self-defense instruction to a lesser-included-offense instruction. *See Ackley v. State*, No. 01-97-00667-CR, 1998 WL 163695, at *1 (Tex. App.—Houston [1st Dist.] Apr. 9, 1998, no pet.) (mem. op., not designated for publication) (no error where defendant did not object to the lack of a self-defense paragraph on the lesser-included offense of resisting arrest, for which he was found guilty); *Shackelford*, 2005 WL 2230227, at *2-3 (no error where the charge applied the self-defense instruction only to the lesser-included offense of aggravated assault and the defendant was found guilty of the greater offense of murder); *Wilkerson v. State*, No. 05-98-00987-CR, 2000 WL 566960, at *1-2 (Tex. App.—Dallas Apr. 28, 2000, no pet.) (op. nunc pro tunc) (mem. op., not designated for publication) (because the defendant failed to object to the jury charge that applied self-defense to the offense of murder, but not the lesser-included offense of manslaughter, her complaint on appeal was foreclosed); *Borja v. State*, No. 05-02-01378, 2003 WL 22017226, at *4 (Tex. App.—Dallas Aug. 27, 2003, pet. ref'd) (mem. op., not designated for publication) (no error where the appellant failed to request a jury instruction applying the law of self-defense to party liability); *but see Burd v. State*, 404 S.W.3d 64 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Newton v. State*,

No. 05-06-00107-CR, 2008 WL 73535, at *1 (Tex. App.—Dallas Jan. 8, 2008, pet. ref'd) (mem. op., not designated for publication) (implicitly finding that the failure to object to a trial court's failure to apply the law of self-defense to the lesser-included offense of aggravated assault was error by holding that the appellant must demonstrate egregious harm).

The First Court relied on *Burd v. State*, a published case out of that court.[1] *See Burd*, 404 S.W.3d 64 (Tex. App. . The First Court held in *Burd* that because the charge did not apply self-defense to the lesser-included offense, there was error in the charge. *Id.* at 71. *Burd*, however, did not discuss *Posey*, its prior holding in the unpublished *Ackley* case, nor did it discuss the requirement that defendants must request defensive issues. In fact, the State was unable to find a case that directly considered this issue upon *Posey* grounds.

The First Court of Appeals's Argument

In a footnote, the First Court addressed the State's motion for rehearing stating, "once the trial court included self-defense in the abstract portion of the charge, it became 'law applicable to the case' and the trial court was required to apply that defensive issue properly to the case." *Mendez*, 2017 WL 1230596, at

[1] The Court also relied on *Jordan v. State* to find that there was error in the charge. *See* 782 S.W.2d 524 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). *Jordan*, however, is distinguishable because it both predated *Posey* and involved an explicit objection by the defendant. *Id.* at 525.

*fn 1 (citing *Vega v. State*, 394 S.W.3d 514, 520 (Tex. Crim. App. 2013) and *Barrera v. State*, 982 S.W.2d 415, 416–17 (Tex. Crim. App. 1998)).

The rule cited in *Barrera*, and followed in *Vega*, is distinguishable from the present case. Unlike here, *Vega* and *Barrera* included defects in the charge. The charges in those cases were incomplete because they contained only abstract instructions on the defensive issues but not correct application paragraphs. *See Vega*, 394 S.W.3d at 520 (where the judge sua sponte included an abstract definition for entrapment, but the application paragraph did not list the specific conditions under which the jury was authorized to acquit); *Barrera*, 982 S.W.2d at 416 (where the judge sua sponte included an abstract jury instruction, but no application instruction). In contrast, this case included a complete self-defense instruction – with both an abstract paragraph and an application paragraph as to the offense of murder.

By attempting to apply *Barrera* and *Vega* to this case, the First Court assumes that a defensive issue stacked on another defensive issue is the law applicable to the case. The First Court's statement that "the trial court was required to apply that defensive issue properly to the case" is equivalent to the appellate court substituting its own judgment for the judgment of the trial attorneys. This rule does not take into account possible strategic reasons for not wanting a self-defense instruction on a lesser-included offense, which are both

defensive issues. This rule contradicts *Posey*'s holding that defensive issues should be strategic issues left up to the lawyer, and must be included only upon request. *See Posey*, 966 S.W.2d at 62.

CONCLUSION

The First Court held that a trial court commits reversible error by *sua sponte* failing to submit a self-defense instruction to a lesser-included offense instruction in the jury charge – a defensive issue instruction stacked on another defensive issue instruction. The better rule, in line with this Court's decision in *Posey* and its progeny, would be that trial courts are not required to *sua sponte* include instructions on defensive issues in the jury charge, even when they are stacked upon each other (i.e. a self-defense instruction stacked on a lesser-included-offense instruction).

PRAYER FOR RELIEF

The State respectfully asks this Court to reverse the decision of the First Court of Appeals and return this case to the First Court to consider the other points of error raised by the appellant on appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the number of words in the foregoing computer-generated document is 2,097, based upon the representation provided by the word processing program that was used to create the document, and excluding the portions of the document identified in Rule 9.4(i)(1).

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This is to certify that a copy of the foregoing instrument has been sent to the following email address via TexFile:

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